

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:

RICHARD NIEMEYER and  
PATRICIA NIEMEYER,

Complainant,

and

KENNEDY REAL ESTATE and  
CRAIG KENNEDY,

**Respondent.**

CHARGE NO(S): 2006SH2580  
HUD NO(S): 05-06-0895-8  
ALS NO(S): S06-471

## NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION

Entered this 9<sup>th</sup> day of April 2010

**N. KEITH CHAMBERS**  
**EXECUTIVE DIRECTOR**

2. At the time of the signing, Patricia Niemeyer gave Respondents a deposit of \$1,800, \$600 of which represented the first month's rent, \$600 of which represented the last month's rent, and \$600 of which represented a security deposit. The lease also contained a

termination clause that provided that upon termination by Complainants of the lease prior to its expiration, Complainants would forfeit any and all security deposits given to Respondents.

3. At all times pertinent to the instant case, Richard Niemeyer was wheel-chair bound with a serious leg injury requiring that he receive in-home assistance from third-parties to address his medical issues.

4. On September 26, 2005, Patricia Niemeyer requested Craig Kennedy to cancel the lease and return their \$1,800 deposit since Complainants had received an offer of a handicapped accessible apartment from the Jackson County Housing Authority. The record is silent as to whether Kennedy agreed to cancel the lease, but Kennedy did agree to return Complainants' \$1,800 deposit, but only after he had found a substitute tenant.

5. Shortly after September 26, 2005, Kennedy placed a "for rent" sign on the subject property, and Patricia Niemeyer thereafter contacted Kennedy's office twice a month to determine the status of the property.

6. In November of 2005, Complainants moved to the rental unit offered by the Jackson County Housing Authority without any significant problems.

7. On December 15, 2005, Craig Kennedy rented the subject property to a tenant, who signed a lease covering a period from January 1, 2006 to July 31, 2006.

8. Shortly after December 15, 2005, Patricia Niemeyer called Kennedy, who informed her that he had rented the subject property. During the same telephone call, Kennedy set up an appointment for December 19, 2005 for Complainant to come into his office to collect her deposit.

9. On December 19, 2005, Patricia Niemeyer came to Kennedy's office to collect what she believed was her \$1,800 deposit. Upon entering the office, Kennedy told her that: (1) his secretary was gone for the day; and (2) because Patricia's husband is disabled, he (Kennedy) could take care of her. Kennedy also told Patricia that she could have her money back if she would give Kennedy a "Christmas present." Patricia then asked Kennedy what he

meant by his Christmas present comment. Kennedy responded with a chuckle, which led Patricia to believe that Kennedy was asking for sex.

10. Kennedy thereafter gave Patricia a check for \$300 instead of \$1,800 because Patricia had refused his sexual advance and because of Richard Niemeyer's handicapped status.

11. In January of 2006, Patricia Niemeyer began seeing a counselor approximately two times a month up until the time of the public hearing concerning her emotional distress that arose out of the encounter with Craig Kennedy in his office on December 19, 2005. Patricia also discussed with the counselor other issues, such as the serious nature of her husband's illness, that were unrelated to the December 19, 2005 encounter. Patricia was billed \$241.04 per month (or \$4,820.80 total) for said services. The reasonable counseling expenses attributable to the allegations in the instant Charge of Discrimination are \$2,410.40.

12. Patricia Niemeyer experienced \$300 in drug-related expenses following the December 19, 2005 encounter at issue in her Charge of Discrimination. The reasonable drug-related expenses attributable to the allegations in the instant Complaint are \$150.

13. As a result of Craig Kennedy's conduct towards her, Patricia Niemeyer experienced emotional distress in the amount of \$5,000 arising out of his conduct during the December 19, 2005 encounter.

14. Richard Niemeyer did not seek any emotional distress damages arising out the allegations contained in his Charge of Discrimination.

#### **Conclusions of Law**

1. A default judgment admits every well-pleaded allegation of the Charge of Discrimination. It does not admit to any conclusions of law mentioned in the Charge of Discrimination and does not admit that the facts stated in the Charge of Discrimination constitute a legal cause of action.

2. Complainants' allegations contained in their joint Charge of Discrimination establish a viable cause of action for a violation of sections 3-102(B) and 3-102.1(B) of the Human Rights Act.

3. Complainants are entitled to actual damages associated with the violation of section 3-102(B) and 3-102.1(B) of the Human Rights Act.

### **Discussion**

On December 21, 2006, the Commission entered an Order, which granted the Department's petition for hearing to determine damages and found Respondents to be in default due to their failure to file a timely response to the Charge of Discrimination. However, while a default judgment admits every well-pleaded allegation in the Charge of Discrimination, it does not admit to any conclusions of law contained in the Charge of Discrimination and does not admit that the facts stated in the Charge of Discrimination constitute a legal cause of action under the Human Rights Act. (See, for example, *People ex rel Lacanski v Backes*, 19 Ill2d 541, 543 (1960), *Walgreen Co v American National Bank & Trust*, 4 IllApp3d 549, 281 NE2d 462 (1<sup>st</sup> Dist 1972), and *Kessinger and Harshman*, IHRC, 04-449, January 23, 2006.) Here, Respondents, in a general way, have raised the issue as to whether either Complainant is entitled to any damages because, according to Respondents, the admitted allegations in Complainants' Charge of Discrimination do not actually state a valid cause of action under either section 3-102(B) or 3-102.1(B) of the Human Rights Act, which provide that it is a civil rights violation for a person engaging in a real estate transaction to alter the terms, conditions or privileges of a real estate transaction on account of an individual's sex or handicap. In short, Respondents contend that: (1) the signed rental lease is the relevant transaction at issue in the instant Complaint; and (2) the admitted allegations in the Charge of Discrimination do not demonstrate any attempts by them to alter the terms of the lease, but rather demonstrate their attempts to enforce said terms as they pertained to any return of Complainants' deposit.

However, to the extent that both Respondents are asking that I determine the propriety of the Commission's finding of default, the Commission has found that such a request is impermissible under *Pinkerton Security Services v Department of Human Rights*, 309 IllApp3d 48, 772 NE.2d 1148 (1<sup>st</sup> Dist. 1999). (See, for example, *Dinardo and P.C. Electronics*, IHRC, S11804, June 22, 2005.) Moreover, even if they could have raised it, Respondents would lose such an argument even though at the time of the December 2005 encounter, Complainants were not actually seeking to rent any property from Respondents, but rather, were attempting to get out of having to rent property that Respondents were fully ready and willing to provide to Complainants (presumably in spite of Richard Niemeyer's handicap and/or Patricia Niemeyer's gender). This is so, as it turns out, because the admitted allegations sufficiently address a term or privilege of a real estate transaction in that the allegations in the instant Charge of Discrimination demonstrate that Patricia was attempting to enforce Kennedy's agreement to return Complainants' \$1,800 deposit that was initially made pursuant to a written rental lease. Thus, the now admitted allegations that Kennedy had refused to return the full \$1,800 security deposit because of Richard Niemeyer's handicap condition and/or because of Patricia Niemeyer's rejection of his sexual advance, comfortably place Complainants' cause of action within the ambit of section 3-102(B) and 3-102.1(B) of the Human Rights Act.

Respondent's denials at the damages hearing that he ever made any sexual or discriminatory comments to Complainants, or that he ever promised Patricia a full return of Complainants' \$1,800 deposit do not require a different result since Respondents cannot attack the factual basis for a default judgment by merely giving neutral reasons for the actions. (See, for example, *Crump and Castlehaven Care Center, Inc.*, IHRC, S11484, July 23, 2002.) Thus, while Kennedy's contention that he told Patricia that he would give her a pro-rata share of the deposit money, depending on when the property was rented, makes sense, especially since he had an enforceable lease against Complainants that made them responsible for the payments of rent, Respondents are too late in making such a contention since the time to have made such

a contention is not at the public hearing on damages after a default judgment has been entered, but rather when the proceedings were still at the Department of Human Rights.<sup>1</sup> (See, *Crump*.) As such, Kennedy's reliance on the terms of the lease as a defense to the allegations made in Complainants' Charge of Discrimination is totally irrelevant given the admissions he necessarily made by failing to file a timely response to Complainants' Charge of Discrimination. The same result applies equally to Kennedy's denial that he ever made sexually suggestive remarks to Patricia.

Thus, the only issue remaining in this case pertains to the extent of damages Complainants incurred as a result of Kennedy's conduct. Initially, Complainants seek a return of the \$1,500 balance left on their deposit that Kennedy did not tender to Patricia during the December, 2005 encounter. To that end, I agree with Complainants that they are jointly entitled to the \$1,500 unpaid balance on their rental deposit, in spite of whatever rights Respondents may have had under the terms of the written lease, since the admitted allegations of Complainants' Charge of Discrimination indicate that: (1) Kennedy agreed to return the entire \$1,800 deposit once the property had been rented to another individual; and (2) Kennedy's refusal to return the entire deposit was because of Richard Niemeyer's handicap status and Patricia Niemeyer's gender.

Patricia, however, also asserts that she is entitled to back and future wage claims totaling \$64,246.40, which she contends has been incurred or will be incurred as a result of Kennedy's conduct towards her. Initially, though, this request seems odd since Patricia was not working at the time of the December 2005 encounter or at the time of the public hearing, but rather was going to graduate school at both times. Nevertheless, Patricia calculates her back

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<sup>1</sup> Moreover, at the time of the December, 2005 encounter, it is arguable whether Respondents owed Complainants any return of their deposit where: (1) the lease called for the immediate forfeiture of the \$600 security deposit upon premature termination of the lease by Complainants; and (2) the property had not been rented for the first two months covered by the lease, and the lease signed by the substitute tenant did not cover the last two months covered by Complainants' lease.

wage claim by stating that: (1) she would have been able to obtain employment six months after the December, 2005 encounter had it not been for the emotional distress she endured as a result of the December 2005 encounter; (2) she would have obtained a theoretical job similar to a job she held prior to going to graduate school paying a theoretical wage of \$11.81 per hour for a 40-hour work week; and (3) she would need an additional 20 months of future pay at the theoretical levels established for her back wage claim until she recovered to 80% of her emotional health. Patricia's contentions in this regard, though, are just too speculative to support an award for back or future wages, especially where there is no expert testimony in the record establishing the nature and extent of her emotional damages, her suitability for employment, or any quantification of her emotional health. Alternatively, I find that this request is too speculative where Patricia was not seeking active employment during the relevant time frame, but rather voluntarily took herself out of the job market by attending graduate school.

Patricia additionally submits that she is entitled to recover out-of-pocket costs associated with her medical and mental health treatments arising out the December 2005 encounter. Specifically, Patricia asserts that she has spent \$300 in drugs prescribed by physicians to assist her in her emotional distress, and that she incurred \$4,820.80 in mental health counseling fees over a 20-month period of time up to the time of the public hearing. The problem with these claims, however, is the fact that Patricia candidly admitted at the public hearing that she spoke to her mental health counselor about other stressors in her life during these counseling sessions that were unrelated to the December 2005 encounter. Moreover, Patricia conceded that she was undergoing stress associated with her husband's serious medical condition both before and after the time of the December 2005 incident. As such, and without the testimony of Patricia's mental health counselor<sup>2</sup>, the record is unclear as to what components of the counseling sessions were actually attributable to the December, 2005 encounter. Accordingly, I will

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<sup>2</sup> Complainants had been aware of the August 9, 2007 public hearing since at least April 23, 2007 and had been aware of the default judgment since at least December 26, 2006.



discount both claims 50 percent (i.e., \$2,410.40 and \$150) to account for the other unrelated stressors that Patricia was experiencing at the time of her counseling sessions. Moreover, I reject Patricia's related claim for expenses concerning a projected 20-month period of additional treatment since there is no credible evidence in the record from a medical professional establishing either Patricia's current level of recovery or any need for additional counseling.

Finally, Patricia seeks \$90,000 for what she describe as "incurable damages," which is more properly viewed as emotional distress damages that she allegedly incurred as a result of her encounter with Kennedy in December of 2005. As Patricia views it, she is a fifty year-old female, who has fifteen years left on her working career, such that she has a potential earning capacity of \$450,000, based on the assumption that she would have obtained and maintained a \$30,000 a year job during this time period. Patricia further argues that she has sustained twenty percent permanent damage to her personality, leadership skills and emotional state. Accordingly, she submits that she is entitled to \$90,000 as "incurable damages" if you apply the twenty percent discount to the \$450,000 life-time earnings that she could reasonably have expected to earn until she retired. Again, the problem is that there is no expert testimony to support Patricia's claims as to the nature and extent regarding the "loss" of her emotional state, personality and leadership skills. Moreover, Patricia can only speculate as to what her future earnings might be or the type of job she may be able to obtain in the future.

True enough, Patricia presented the testimony from her husband's care-giver and another family friend to establish that she had a change in personality after the December, 2005 encounter with Kennedy. This testimony, though, still does not establish the nature and extent of Patricia's emotional distress damages and certainly does not establish how Patricia could have sustained a quantifiable 20 percent damage to her emotional state based upon a series of three verbal comments made by Kennedy. This is not to say, though, that Patricia did not incur some emotional distress stemming from the December 2005 encounter. In this respect, where the record shows that there was no physical touching by Kennedy during the encounter and no

direct request for sexual favors, I find that \$5,000 is a more appropriate figure for Patricia's emotional distress. See, for example, *Tipps and Hall*, IHRC, S05-177, September 27, 2006, where the complainant received \$5,000 for embarrassment caused when the harasser gave her an unwanted dildo as a "gift," and *Dinardo and P.C. Electronics*, IHRC, S11804, June 22, 2005, where the Commission awarded \$4,000 to the complainant, who encountered a one-time verbal assault in which the complainant was cursed at and called a "stupid bitch" and a "fucking cunt" on the telephone by employees of the respondent, and who experienced crying sessions up to the time of the public hearing that required that she seek professional help. Finally, I would note that Richard Niemeyer has not sought any emotional distress damages arising out of the December 2005 encounter.

#### **Recommendation**

For all of the above reasons, it is recommended that:

1. The default judgment against both Respondents be sustained.
2. Both Complainants jointly receive \$1,500 balance due on their rental deposit.
3. Complainant Patricia Niemeyer receive \$2,560.40 as reimbursement for counseling and drugs expenses.
4. Complainant Patricia Niemeyer receive \$5,000 in emotional distress damages.

HUMAN RIGHTS COMMISSION

BY: \_\_\_\_\_  
MICHAEL R. ROBINSON  
Administrative Law Judge  
Administrative Law Section

ENTERED THE 30TH DAY OF JUNE, 2009